4-26-2010

Watson v. Joslin Millwork, Inc. Appellant's Reply Brief Dckt. 37166

Rick D. Kallas
Idaho State Bar No. 3872
Ellsworth, Kallas, Talboy & DeFranco, P.L.L.C.
1031 E. Park Blvd.
Boise, Idaho 83712
Telephone: (208) 336-1843
Facsimile: (208) 345-8945
E-mail: rdk@greyhawklaw.com

Attorney for Claimant / Appellant

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

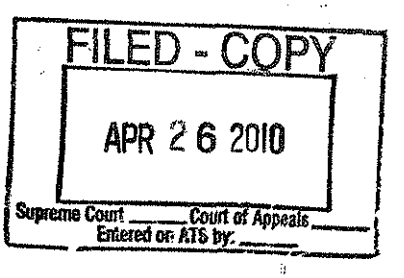
ROBERT A. WATSON, Claimant/Appellant, vs. JOSLIN MILLWORK, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants/Respondents.	Supreme Court No. 37166-2009 **APPELLANT'S REPLY BRIEF**

APPEAL FROM THE INDUSTRIAL COMMISSION, STATE OF IDAHO

Chairman, R.D. Maynard, Presiding
Referee Michael E. Powers

Attorney For Appellant

Rick D. Kallas
1031 E. Park Blvd.
Boise, ID 83712
(208) 336-1843



Attorney For Respondents

E. Scott Harmon
P.O. Box 6358
Boise, ID 83707
(208) 327-7563

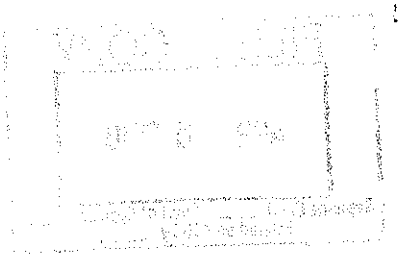


TABLE OF CONTENTS

i. Cover Sheet.....1
ii. Table of Contents.....2-3

(I) Table of Cases and Authorities.....3-5

(II) The Proper Standard of Judicial Review.....5-6

(III) Argument.....6-47

(1) The Defendants admitted that the Claimant met PFC burden of proof.....6-7

(2) The Claimant met his burden of proving a prima facie case for an occupational disease claim.....7-12

(3) The Defendants failed to rebut the Claimant's prima facie case with evidence that was properly disclosed prior to the 12.19.08 hearing.....12-17

(4) The Claimant was entitled to benefits as a matter of law based on the evidence in the record at hearing.....18-19

(5) The Industrial Commission's conclusion that the 14 new opinions expressed by Dr. Weiss during his post-hearing deposition were just mere explanations of his pre-hearing opinions was not supported by substantial and competent evidence in the record.....19-22

(6) The Industrial Commission misapplied the law when it denied the Claimant's Motion To Strike Undisclosed Medical Opinions:

(a) The Claimant's I.R.C.P. 26(b)(4) Motion To Strike.....22-24

(b) The Claimant's J.R.P. 10(E)(4) Motion To Strike.....25-27

(7) The Industrial Commission misapplied the law by unfairly weighing Dr. Weiss' 14 new / different post-hearing opinions against Dr. Frizzell's properly disclosed pre-hearing opinions.....27-29

(8) The Defendants admit that Dr. Weiss was not competent to render a causation opinion because he knew nothing about the hazards of the Claimant's Sawyer / Assembler job but claim that lack of a proper factual foundation is irrelevant.....29-32

(9) The facts and medical opinions of this case are closely analogous to *Flores*.....32-34

(10) *Nelson* is an affirmative defense that must be raised and proved by the Defendants..34-36

(11) There was no substantial and competent evidence in the record to prove a preexisting low back condition that could serve as the foundation for the *Nelson* defense:

a. Prior to working For Joslin the Claimant did not complain to another employer that he wanted to get out of the drywall business due to low back pain.....36-38

b. The Claimant's 2 prior auto accidents did not injure his low back.....38

c. 2 visits to Dr. Meissner in December of 2005 do not support the Commission's findings of preexisting underlying arthritis, degenerative disc disease and facet arthritis, and underlying degenerative joint disease and arthritis.....38-39

(12) The Defendants effectively concede that the Industrial Commission misapplied the law of *Nelson* and its progeny.....39-41

(13) The Industrial Commission completely overlooked substantial and competent evidence in the record on the causation issue 41-43

(14) The Claimant's Corrections of the Defendants' Misstatements of the Record

a. The Defendants' claim that Dr. Weiss's IME report had a causation opinion.....43-45
b. The Defendants' claim they made pre-hearing disclosure of all medical evidence.....45
c. The Defendant's claim that Claimant had the opportunity for proper rebuttal.....45-46

(15) The Claimant's entitlement to attorney's fees pursuant to Idaho Code §72-804.....46

(IV) **Conclusion**.....47

(I) TABLE OF CASES AND AUTHORITIES

Cases **Pages Cited**

Anderson v. Harper's Inc., 143 Idaho 193, 141 P.3d 1062 (2006).....8

Bromley v. Garey, 132 Idaho 807, 979 P.2d 1165 (1999).....31

Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791 (1977).....14

Clark v. Klein, 137 Idaho 154, 45 P.3d 810 (2002).....13, 14, 23

Curr v. Curr, 124 Idaho 686, 864 P.2d 132 (1993).....42

Edmunds v. Kraner, 142 Idaho 867, 136 P.3d 338 (2006).....17

Emery v. J.R. Simplot Co., 141 Idaho 407, 111 P. 3d 92(2005).....9, 13

Flores v. Boise Cascade, 2008 IIC 0420 (2008).....32, 33

J-U-B Engineers v. Security Ins., 146 Idaho 311, 193 P.3d 858 (2008).....31

Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995)....8, 10

Lorca-Merono v. Yokes Washington Foods, Inc., 137 Idaho 446, 50 P.3d 461 (2002).....26, 28

McLean v. City of Spirit Lake, 91 Idaho 779, 430 P.2d 670 (1967).....7

Miller v. Belknap, 75 Idaho 46, 266 P.2d 662 (1954).....18, 19

Nelson v. Ponsness-Warren Idgas Enter.,126 Idaho 129, 879 P.2d 592 (1994).....34, 38

Page v. McCain Foods, Inc. (Page II), 145 Idaho 302, 179 P.3d 265 (2008).....31

Politte v. Idaho Dept. of Trans. and State Ins. Fund, 126 Idaho 270, 882 P.2d 437 (1994).....32

Seamans v. Maaco Auto Painting & Body Works, 128 Idaho 747, 918 P.2d 1192 (1996).....34

Schmechel v. Dille, 148 Idaho 176, 219 P.3d 1192 (2009).....23

State, Dep't of Health Welfare ex rel. Lisby v. Lisby, 126 Idaho 776, 890 P. 2d 727 (1995).....27

Stevens-McAtee v. Potlatch Corp., 145 Idaho 325, 179 P.3d 288 (2008).....6, 9, 18

Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005).....11, 40

Sun Valley Shopping Center Inc. v. Idaho Power Co., 119 Idaho 87, 803 P.2d 993 (1991)....7, 24

Statutes

Idaho Code §72-201.....5, 47

Idaho Code §72-408, §72-409, and §72-419.....47
Idaho Code §72-432(1).....47
Idaho Code §72-508.....9, 12, 13, 14
Idaho Code §72-804.....46, 47

Judicial Rules of Practice and Procedure Under The Idaho Worker's Compensation Law

J.R.P. Preamble.....12
J.R.P. 1(B)(6).....9
J.R.P. 6(B).....9
J.R.P. 7(A) and 7(C).....13, 24, 27
J.R.P. 10(E)(4).....25, 26, 27, 29

Idaho Rules of Civil Procedure

I.R.C.P. 26(b)(4).....13, 16, 17, 22, 23, 24, 27, 29
I.R.C.P. 26(e).....13, 17, 22, 23, 24, 27, 29

Idaho Rules of Evidence

I.R.E. 703.....31

(II) THE PROPER STANDARD OF APPELLATE REVIEW

When the Industrial Commission has improperly denied a claim based on the misapplication of the law to the evidence and / or on the entry of erroneous findings of fact, this Court must **set aside** the Commission's denial of benefits and award the Claimant the sure and certain relief that is promised to him by Idaho Code §72-201:

> This Court exercises free review over the Commission's legal conclusions and may substitute its view for the Commission's view. Kessler ex. Rel. Kessler v. Payette County, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997). Although this Court may review the Commission's factual findings, this Court must limit its review to determining whether the Commission correctly denied benefits after it applied the law to the relevant facts. Id. Whether an injury arose out of the course of employment is a question of fact to be determined by the Commission. Id. The Commission's factual findings will not be disturbed on appeal so long as they are supported by substantial and competent evidence. I.C. § 72-732; Neihart v. Universal Joint Auto Parts, Inc., 141 Idaho 801, 803, 118 P.3d 133, 135 (2005).

> Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion. Page v. McCain Foods, Inc., 141 Idaho 342, 344, 109 P.3d 1084, 1086 (2005). Credibility of witnesses and evidence is a matter within the province of the Commission. Zapata v. J.R. Simplot Co., 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). As such, the Commission's findings on weight and credibility will not be disturbed on appeal if they are supported by substantial and competent evidence. Id. In making our determinations, this Court "must liberally construe the provisions of the worker's compensation law in favor of the employee, in order to serve the humane purposes for which the law was promulgated." Jensen v. City of Pocatello, 135 Idaho 406, 413, 18 P.3d 211, 218 (2000) (citing Murray-Donahue v. Nat'l Car Rental Licensee Ass'n., 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995)). *Stevens- McAtee v. Potlatch Corp.*, 145 Idaho 325, 328-329, 179 P.3d 288, 291-292 (2008).

(III) ARGUMENT

(1) THE DEFENDANTS ADMITTED THAT CLAIMANT MET HIS PFC BURDEN OF PROOF

The Defendants have argued in their 4.2.10 Response Brief that the Claimant failed to meet his burden of proving a prima facie case for a compensable occupational disease claim (Resp. Br., p. 11, Ll. 6-11). However, the Defendants' argument is **directly contradicted** by their prior admission to the Industrial Commission that the Claimant had met his burden of proof:

> At best, with the opinion of Dr. Frizzell, Claimant has met his prima facia [sic] [facie] case/burden of proof (Def. 5.1.09 Resp. Br., p. 13, Ll. 14-15).

The **admission** of defense counsel that Claimant met his burden of proof is **binding on the Defendants**:

> It is settled law in this state that a formal admission made by an attorney at trial is binding on his client as a solemn judicial admission. Hill v. Bice, 65 Idaho 167, 139 P.2d 1010. See, Bell, Handbook of Evidence (1957), p. 159. It is well recognized that a judicial admission, applied to the judicial proceedings in which it is made, limits the issues upon which the cause is to be tried and obviates the necessity for proof of facts within the ambit of a distinct and unequivocal

admission or stipulation so made. 31A C.J.S. Evidence § 299, p. 765, § 381e, p. 926; 29 Am.Jur.2d Evidence § 615, p. 668; 9 Wigmore, Evidence (3rd Ed. 1940), §§ 2588, 2590, pp. 586, 587. *McLean v. City of Spirit Lake,* 91 Idaho 779, 783, 430 P.2d 670, 674 (1967).

The Claimant asked the Commission to amend paragraph 7 of its 6.8.09 decision to accurately reflect that the Defendants had already **admitted** that Claimant had met his PFC burden of proof (R., p., 104, ¶7(c), but the Commission failed to make findings of fact and conclusions of law in its 10.14.09 Order On Reconsideration which explained why it refused to apply the Defendants' binding admission against them (R., pp. 170-178). Based on this record, this Court cannot determine if the Commission abused its discretion:

> The test for determining whether a district court abused its discretion is: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *Sun Valley Shopping Center Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

(2) THE CLAIMANT MET HIS BURDEN OF PROVING A PRIMA FACIE CASE

Even if the Defendants' binding admission that the Claimant met his PFC burden of proof is not applied against them, the Claimant presented sufficient evidence to meet his burden of proof. Both the Claimant and the Defendants have defined the critical issue in this case to be ***causation***:

> The critical dispute in this case is over whether the Claimant's ***exposure*** to the hazards of repetitive heavy lifting, twisting and bending ***caused*** the Claimant's lumbar spine degenerative disc disease? (App. Br., p. 17, Ll. 18-20).
>
> ***
>
> As Claimant correctly notes, the ***fundamental dispute*** in this case is ***whether or not Claimant's job duties caused his lumbar degenerative disc disease*** (Resp.

Br., p. 9, Ll. 11-13) (emphasis supplied).

To prove causation in an occupational disease claim, the Claimant must satisfy the following standard:

> As with industrial accident claims, an occupational disease claimant has the burden of proving, to a reasonable degree of medical probability, a ***causal connection*** between the ***condition*** for which compensation is claimed and occupational ***exposure*** to the substance or conditions which caused the alleged condition. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 786, 890 P.2d 732, 737 (1995) (emphasis supplied).

The Claimant was **not** required to call Dr. Frizzell or Dr. Bates to testify at hearing or during a post- hearing deposition to meet his burden of proving causation:

> The Commission may not decide causation without opinion evidence from a medical expert. *Jones v. Emmett Manor,* 134 Idaho 160, 997 P.2d 621 (2000). There is no absolute requirement, however, that the opinion evidence be presented by the expert testifying either at the hearing or by deposition. *Id.* A ***claimant can rely upon an opinion*** contained in a ***medical report to establish causation.*** *Anderson v. Harper's Inc.,* 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006) (emphasis supplied).

When the Industrial Commission examines the medical causation opinions that are expressed in medical reports, it must apply this Court's liberal causation standards:

> This Court has held that ***no special verbal formula*** is necessary when a doctor's testimony ***plainly and unequivocally conveys his conviction*** that events are causally related. Jensen, 135 Idaho at 412-13, 18 P.3d at 217-18 (citing Paulson v. Idaho Forest Indus., Inc., 99 Idaho 896, 901, 591 P.2d 143, 148 (1979), overruled on other grounds by Jones v. Emmett Manor, 134 Idaho 160, 165, 997 P.2d 621, 625 (2000) (holding that "To the extent Dean v. Dravo Corp., 95 Idaho 558, 511 P.2d 1334 (1973) and Paulson . . . suggest a requirement of oral medical testimony in every case, the suggestion is disavowed.")). Rather even if a doctor expressly refuses to say the words "reasonable degree of medical probability," it can still be clear from his or her testimony that he or she considers that a claimant's injury more likely than not was caused by a work related accident.

> Jensen, 135 Idaho at 412, 18 P.3d at 217. *Stevens- McAtee, supra,* 145 Idaho 325, 334, 179 P.3d 288, 297 (2008).

Idaho Code §72-508 gives the Industrial Commission the authority to promulgate and adopt reasonable judicial rules **which are binding** in the adjudication of worker's compensation claims.

> I.C. § 72-508 explicitly grants the Commission ***the authority to adopt rules governing judicial practice and procedure*** in front of the Commission.

Idaho Code § 72-508 states that:

> [T]he Commission shall have authority to promulgate and adopt reasonable rules and regulations for effecting the purposes of this [Workers' Compensation] act.... [T]he commission shall have **authority to promulgate** and adopt reasonable **rules and regulations involving judicial matters**.... Rules and regulation as promulgated and adopted, if not inconsistent with law, **shall be binding** in the administration of this law. *Emery v. J.R. Simplot Co.*, 141 Idaho 407, 409, 111 P. 3d 92, 94 (2005) (emphasis supplied).

The Industrial Commission's Judicial Rules of Practice and Procedure Under The Idaho Workers' Compensation Law (2004) allow the Claimant to meet his **prima facie case** (PFC) burden of proof by relying on medical opinions that are expressed in medical reports:

> "Prima facie" is the first appearance of evidence. A prima facie case is established by sufficient evidence to prove eligibility for benefits. See Rule 6. J.R.P. 1(B)(6).
>
> The party may establish such prima facie case by submitting affidavits, depositions, and/or medical reports to the Commission along with the party's application or, alternatively, it may file a request for hearing to establish a prima facie case. Proof of medical facts at hearing may be made in the manner set forth in Rule 10 below. J.R.P. 6(B).

The Claimant offered 2 written reports from Dr. Frizzell and 1 written report from Dr. Bates into evidence at the 12.19.08 hearing in order to prove his prima facie case for a

compensable occupational disease claim (Ex. 8, pp. 008039-008042) (Ex. 7, pp. 007016-007017). All 3 of the Claimant's prima facie case medical reports were admitted into evidence without objection from the Defendants (Tr., p. 6, L. 4 – p. 7, L. 8).

Dr. Frizzell and Dr. Bates both read the Claimant's written job description (Ex. 3), **addressed each element in the prima facie case** for a compensable occupational disease claim and **plainly and unequivocally expressed their conviction** that the Claimant was suffering from a non-acute lumbar spine occupational disease that was **caused by** his **exposure** to the hazards of repetitive heavy lifting, twisting and bending which were characteristic of and peculiar to his Sawyer / Assembler job at Joslin Millwork (Ex. 8, pp. 008039-008042) (Ex. 7, p. 007016-007017).

The medical opinions set forth in Dr. Frizzell's and Dr. Bates' properly disclosed pre-hearing medical reports were **unrebutted** at the time of the 12.19.08 hearing and satisfied this Court's standards for proving the elements of an occupational disease claim:

> An occupational disease is one that is "due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment . . ." I.C. § 72-102(18)(a). [now I.C. §72-102(22)(a)]. "Contracted" and "incurred," when referring to an occupational disease, are deemed equivalent to "arising out of and in the course of employment." I.C. § 72-102(18)(b) (quotations omitted) [now I.C. §72-102(22)(b)].
>
> As with industrial accident claims, an occupational disease claimant has the burden of proving, to a reasonable degree of medical probability, a causal connection between the condition for which compensation is claimed and occupational exposure to the substance or conditions which caused the alleged condition. Hagler v. Micron Technology, Inc., 118 Idaho 596, 598, 798 P.2d 55, 57 (1990). *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 786, 890 P.2d 732, 737 (1995) (emphasis supplied).

***

> Idaho Code § 72-102(21)(b) [now I.C. §72-102(22)(b)] defines the word at issue, stating that "'[c]ontracted' and 'incurred,' when referring to an occupational disease, shall be deemed the equivalent of the term 'arising out of and in the course of' employment."
>
> Because in Idaho's worker's compensation law the word "incurred" means "'arising out of and in the course of' employment," it is as much a reference to cause as to a particular point in time. See I.C. § 72-102(21)(b). As an occupational disease develops over time, it is possible for the disease to be "incurred" by a claimant under a series of different employers before it becomes manifest. *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 456, 111 P.3d 135, 141 (2005).

Although the Commission did not explicitly find that the Claimant had met his burden of proving a prima facie case for an occupational disease claim, the Commission **impliedly found** that the Claimant presented sufficient evidence to meet his prima facie case burden of proof:

> First, Claimant argues that the Commission erred when it concluded Claimant failed to prove his lumbar spine injury was an occupational disease incurred at work. **Claimant contends that he presented overwhelming evidence to prove his case. Claimant's testimony, Dr. Frizzell's letter, and other evidence support Claimant's argument. The Commission acknowledges that Claimant presented evidence to support his case**, but the Commission was not persuaded by Dr. Frizzell's opinion. (R. , p. 173, Ll. 9-14) (emphasis supplied).
>
> When viewed in context of the entire case, **the Commission was persuaded by Dr. Weiss's observations and opinions** that Claimant's suffered from preexisting degenerative disease and facet joint arthropathy (R., p. 173, LL. 19-21)(emphasis supplied).

The Commission acknowledged that the Claimant presented sufficient evidence to prove his prima facie case and did **not** deny this claim on the grounds that the Claimant failed to meet his burden of proof. The Commission denied this claim based on its misapplication of the law because it **unfairly weighed** Dr. Weiss' 14 new / different post-hearing deposition opinions

(which were **not properly disclosed** by the Defendants **prior to** the 12.19.08 hearing) **against** the properly disclosed opinions set forth in Dr. Frizzell's 5.5.08 PFC medical report (Ex., p. 008039-008040) [1]. Based on the Defendants' admission and the Commission's implied finding, there was no substantial and competent evidence in the record at the time of hearing to support the Commission's legal conclusion that the "Claimant has failed to prove that the need for his lumbar surgery is the result of an occupational disease arising out of and in the course of his employment." (R., p. 96, ¶ 1 of Conclusions of Law).

(3) THE DEFENDANTS FAILED TO REBUT THE CLAIMANT'S PRIMA FACIE CASE WITH EVIDENCE THAT WAS PROPERLY DISCLOSED PRIOR TO THE 12.19.08 HEARING

The Preamble to the J.R.P. states that the following rules of procedure shall govern judicial matters that come before the Industrial Commission:

> By virtue of the authority vested in the Industrial Commission pursuant to Idaho Code §§ 72-508 and 72-707, the Industrial Commission of the State of Idaho **hereby adopts the following rules of procedure governing judicial matters** under its jurisdiction as provided by the Idaho Workers' Compensation Law. These rules shall amend and supplement those rules previously adopted by the Commission.
>
> RULE 7
> DISCOVERY
>
> A.
> Parties may obtain **discovery** by one or more of the following methods: depositions by oral examination or written questions, **written interrogatories, or requests for production of documents or things**.
> B.
> Requests for admissions shall not be allowed. This provision notwithstanding, the

---

[1] See Arguments 5-8, *infra*, at pp. 19-32 for an explanation of how the Industrial Commission misapplied the law when it unfairly weighed Dr. Weiss' 14 new post-hearing deposition opinions that were **not** disclosed pre-hearing against Dr. Frizzell's properly disclosed pre-hearing opinions.

parties may agree to admit facts prior to hearing.
C.
Procedural matters relating to discovery, except sanctions, **shall be controlled by the appropriate provisions of the Idaho Rules of Civil Procedure**.
(emphasis supplied).

J.R.P. 7(A) gave the Claimant the right to serve written interrogatories and requests for production of documents on the Defendants. J.R.P. 7(C) gave the Claimant the right to serve the Defendants with an I.R.C.P. 26(b)(4) **expert witness disclosure** interrogatory because it expressly states that procedural matters relating to discovery (like pre-hearing expert witness disclosures) **shall be controlled by** the appropriate provisions of the Idaho Rules of Civil Procedure.

The Defendants argue that the **expert witness disclosure** requirements of I.R.C.P. 26(b)(4) do **not** apply to the adjudication of workers compensation claims because the "Claimant cites no case in support of this proposition" (Resp. Br., p. 15, L. 8). The Defendants also make the argument that this Court's holding in *Clark v. Klein*, 137 Idaho 154, 45 P.3d 810 (2002) does not apply to workers' compensation claims because "*Clark* is a civil case that has nothing whatsoever to do with workers [sic] [workers'] compensation" (Resp. Br., p. 13, f.n. 11).

The Defendants' arguments are **directly contradicted** by the plain language of J.R.P. 7 which expressly states that **procedural matters** (like pre-trial expert witness disclosures) **shall be governed by** the Idaho Rules of Civil Procedure. Idaho Code §72-508 states that the pre-hearing discovery rules of J.R.P. 7 **shall be binding** in the adjudication of workers' compensation claims. *Emery, supra*, 141 Idaho 409, 111 P.3d 94 (2005). The Court should reject the Defendants' arguments that I.R.C.P. 26(b)(4), I.R.C.P. 26(e) and this Court's holding

in *Clark* do not apply to workers' compensation claims because the Defendants' position is directly contradicted by the plain language of Idaho Code §72-508 and J.R.P. 7.

The Claimant served the Defendants with pre-hearing discovery to force the Defendants to make **full pre-hearing disclosure** of all adverse facts and all adverse medical opinions that the Defendants were relying on to support their contentions, denials and affirmative defenses to this occupational disease claim.

> "The **need** to develop all relevant facts in the adversary system is both **fundamental and comprehensive**. * * * The very **integrity** of the judicial system and **public confidence** in the system **depend on full disclosure of all the facts,** within the framework of the rules of evidence. To insure that Justice is done, it is imperative to the function of courts that **compulsory process** be available for the production of evidence needed either by the prosecution or by the defense. *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 293, 562 P.2d 791, 796 (1977), cert. denied, 434 U.S. 930, 98 S.Ct. 418, 54 L.Ed.2d 291 (1977) (emphasis supplied).

The Claimant's contention interrogatories 7-12 **addressed each element in the prima facie case** for an occupational disease claim (R., pp. 1-7) (Ex. 12, pp. 012005-012010).

- Claimant's interrogatory 7 required the Defendants to make full pre-hearing disclosure of all facts relevant to the ***causation*** issue.
- Claimant's interrogatory 8 required the Defendants to make full pre-hearing disclosure of all facts relevant to the ***affliction of a disease*** element of an occupational disease claim.
- Claimant's interrogatory 9 required the Defendants to make full pre-hearing disclosure of all facts relevant to the ***characteristic of and peculiar to*** element of an occupational disease claim.
- Claimant's interrogatory 10 required the Defendants to make full pre-hearing disclosure of all facts relevant to the ***exposure*** element of an occupational disease claim.

- Claimant's interrogatory 11 required the Defendants to make full pre-hearing disclosure of all facts relevant to the ***contracted / incurred*** element of an occupational disease claim.

- Claimant's interrogatory 12 required the Defendants to make full pre-hearing disclosure of all facts relevant to the ***actual and total incapacity*** element of the PFC.

The Defendants **did not disclose a single adverse fact** to rebut the Claimant's PFC proof when they gave the same evasive answer to interrogatories 7-12:

> ANSWER: Defendants continue to evaluate and investigate Claimant's medical condition as it relates to his alleged occupational disease. Please see the documents attached to Defendants' Response to Claimant's Request for Production for documents obtained to date. Once Defendants have confirmed that all medical records have been received and reviewed in their entirety, this Answer will be supplemented (Ex. 12, pp. 012006-012010).

Based on the Defendants' failure to disclose any adverse facts, the following facts presented by he Claimant were **uncontroverted** at the 12.19.08 hearing:

- The Claimant did **not** have any prior low back injuries caused by accidents before going to work for Joslin;

- The Claimant did **not** suffer from a preexisting occupational disease in his low back that had manifested itself before going to work for Joslin;

- The Claimant was **not** involved in any new accidents that caused injury to his low back after going to work for Joslin;

- The Claimant did **not** engage in any physical activities outside of work that could be implicated in the cause of lumbar spine degenerative disc disease;

- Before he became exposed to the peculiar and characteristic hazards of his Sawyer / Assembler job, the Claimant's 12.13.05 lumbar spine X-ray was completely ***"negative for pathology"***;

- After his 12.13.05 base-line X-ray was taken, the Claimant switched jobs to Sawyer / Assembler and became ***exposed to the hazards*** of repetitive heavy lifting, twisting and bending in a confined space at the very fast pace of the production cycle; and,

- After being exposed to the Sawyer / Assembler hazards for approximately 18 months, the Claimant's 1.23.08 MRI showed advanced degenerative changes at the L4-5 and L5-S1 levels of the Claimant's lumbar spine including, but not limited to, degenerative joint disease, facet arthritis and an L5-S1 disc herniation with extruded fragment that caused left lower extremity radiculopathy [2].

Claimant's interrogatory 5 required the Defendants to make all of the **pre-hearing expert witness disclosures** required by I.R.C.P. 26(b)(4):

a. The Defendants were required to make **full pre-hearing disclosure of a complete statement of all opinions** to be expressed by Dr. Weiss in this case;

b. The Defendants were required make **full pre-hearing disclosure of a complete statement of the bases and reasons** for Dr. Weiss' opinions; and,

c. The Defendants were required to make **full pre-hearing disclosure of a complete statement of all data or other information considered** by Dr. Weiss in forming the opinions (Ex. 12, pp. 012003-012004).

The Defendants 7.8.08 answer to interrogatory 5 did **not** provide any of the pre-hearing expert witness disclosure information required by I.R.C.P. 26(b)(4):

> ANSWER: Defendants have not retained any expert they expect to testify at hearing as of this date. Upon identification of any such expert, this Interrogatory answer will be supplemented (Ex. 12, p. 012005).

On 10.10.08, the Defendants supplemented their 7.8.08 answer to interrogatory 5 by serving the Claimant with a copy of Dr. Weiss' 10.1.08 IME report [3] (R., p. 80). Dr. Weiss' 10.1.08 IME report contained 1 medical opinion and 3 generic observations:

---

[2] The citations to the record which verify these uncontroverted facts are set forth at pp. 9-15 of the Statement of Facts in the Appellant's 3.9.10 Opening Brief on appeal.

[3] The Defendants' 10.10.08 supplemental answer to interrogatory 5 is not part of Ex. 12, but the Defendants' supplemental answer merely referred the Claimant to Dr. Weiss' 10.1.08 IME report.

(1) It is within the standard of community practice for the Claimant to have the back surgery recommended by Dr. Frizzell (***case specific medical opinion***);
(2) Back pain and spinal arthritis are common in the general population (***generic observation with no application to this Claimant or the hazards of his job***);
(3) Heavy work is called exercise and exercise is generally thought to be beneficial (***generic observation with no application to this Claimant or the hazards of his job***); and,
(4) Sedentary workers have high rates of back pain complaint and disability (***generic observation with no application to this Claimant or the hazards of his job***) (Ex. 14, Bates No. 014009).

The Defendants never supplemented the pre-hearing expert witness disclosures in Dr. Weiss' 10.1.08 IME report as required by I.R.C.P. 26(e). The Claimant had the fundamental right to rely on the Defendants' representation that Dr. Weiss' 10.1.08 IME report constituted **"a complete statement of all opinions to be expressed"** by Dr. Weiss pursuant to I.R.C.P. 26(b)(4)(A)(i):

> Our **discovery rules** were **designed to prevent surprise at trial**, *Pearce v. Ollie,* 121 Idaho 539, 552, 826 P.2d 888, 901 (1992), and **discovery rules regarding expert witnesses** were designed **to promote fairness and candor,** *see Radmer,* 120 Idaho at 89, 813 P.2d at 900. Effective cross-examination and rebuttal of expert witnesses requires advanced preparation and knowledge of that expert's testimony. *Edmunds v. Kraner,* 142 Idaho 867, 878, 136 P.3d 338, 349 (2006) (emphasis supplied).

Since the Defendants failed to present any evidence to contradict the Claimant's PFC evidence, the record before the Commission at the 12.19.08 heairng did not contain substantial and competent evidence to support the Commission's finding that the "Claimant has failed to prove that the need for his lumbar surgery is the result of an occupational disease arising out of and in the course of his employment" (R., p. 96, ¶ 1 of Conclusions of Law). This Court should reverse the Commission's unsupported finding.

(4) THE CLAIMANT WAS ENTITLED TO BENEFITS AS A MATTER OF LAW BASED ON THE EVIDENCE IN THE RECORD AT HEARING

After the Claimant met his burden of proving a prima facie case, the burden shifted to the Defendants to come forward at hearing and present substantial and competent adverse evidence to rebut the Claimant's proof or suffer whatever judgment the prima facie evidence would support:

> What is intended is, when the plaintiff has made a prima facie case, **the defendant must meet it with countervailing proof or suffer whatever judgment the prima facie proof will support.** *Miller v. Belknap*, 75 Idaho 46, 51, 266 P.2d 662, 665 (1954) (emphasis supplied).

Based on the evidence in the record at the time of the 12.19.08 hearing, the Claimant was entitled to an award of benefits as a matter of law. In the case of *Stevens-McAtee v. Potlatch Corp.,* 145 Idaho 325, 179 P.3d 288 (2008), this Court reversed the Industrial Commission's legal conclusion that the Claimant failed to prove that his herniated disc was caused by an accident because employer / surety did **not** come forward at hearing and present substantial and competent adverse evidence **to contradict** the Claimant's PFC proof:

> Here, neither Potlatch nor Surety offers any substantial evidence **to contradict** McAtee's production of medical evidence which indicates that his acute onset of pain during his work shift on March 9, 2004, represented an acute change in his condition corresponding with the onset of his disc herniation. *Stevens- McAtee, supra,* 145 Idaho 325, 333, 179 P.3d 288, 296 (2008) (emphasis supplied).

At the time of the 12.19.08 hearing, the Defendants in this case had **not disclosed** a single adverse fact or a single adverse medical opinion **to contradict** the Claimant's prima facie case burden of proof. Therefore, this Court should reverse the Industrial Commission's denial of this claim and award worker's compensation benefits to the Claimant as a matter of law. Failure

to rebut the PFC means that the Defendants should "suffer whatever judgment the prima facie proof will support" *Miller, supra*, at 75 Idaho 51, 266 P. 2d 266 (1954).

(5) THE INDUSTRIAL COMMISSION'S CONCLUSION THAT THE 14 NEW OPINIONS EXPRESSED BY DR. WEISS DURING HIS POST-HEARING DEPOSITION WERE JUST MERE EXPLANATIONS OF HIS PRE-HEARING OPINIONS WAS NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE IN THE RECORD

Through reasoning which is still incomprehensible to the Claimant, the Industrial Commission somehow managed to find that the 14 new and / or different medical opinions **expressed for the first time** by Dr. Weiss during his 1.27.09 post-hearing deposition did **not** constitute **"new"** medical opinions at all, but instead were just mere **"explanations"** of the 1 medical opinion and 3 generic observations disclosed by the Defendants in Dr. Weiss' 10.1.08 IME report:

> Further, we find the explanations in the deposition do **not** involve new medical causation opinions (R., p. 177, Ll. 1-2) (emphasis supplied).

Although the Claimant explained why the Industrial Commission's reasoning was faulty at pages 23-25 of his 3.9.10 Appellant's Brief, the Defendants have adopted the Industrial Commission's fallacious reasoning by arguing that Dr. Weiss did not create, manufacture or develop any new medical opinions during his 1.27.09 post-hearing deposition:

> First, Dr. Weiss did not "create" any opinions post-hearing. While his deposition testimony admittedly is lengthier than his IME report, the two do not differ in any meaningful way. The deposition· testimony simply provides the analytic framework Dr. Weiss used when formulating his opinions (Resp. Br., p. 13, Ll. 7-10).

The Commission's conclusion that Dr. Weiss' 14 new / different post-hearing deposition opinions "do not involve new medical causation opinions" (R., p. 177, Ll. 1-3) **should only be**

upheld on appeal if the record confirms that all 14 of Dr. Weiss' new / different post-hearing deposition opinions that the Commission expressly relied to deny this claim **were properly disclosed and set forth** in Dr. Weiss' 10.1.08 IME report.

If Dr. Weiss' 14 new / different post-hearing deposition opinions did **not** appear in Dr. Weiss' 10.1.08 IME report, then it is ***axiomatic*** that they can only be treated as **"new" / "different" opinions** and the Commission's erroneous conclusion to the contrary must be set aside because it is not supported by any substantial and competent evidence in the record.

Pre-Hearing Disclosures In Dr. Weiss' IME Report	vs.	**New Post-Hearing Deposition Opinions From Dr. Weiss That the Commission Relied on to Deny This Claim**
1. It is within the standard of community practice for the Claimant to have the back surgery recommended by Dr. Frizzell (case specific medical opinion);		1. It was not possible to determine when the free fragment occurred, but the Claimant's physical findings do not support the conclusion that his free fragment of disc material was causing his back pain (R., p. 93, ¶9, L. 7 – p. 94, L. 2);
2. Back pain and spinal arthritis are common in the general population (generic observation);		2. It is difficult to say what is causal in something that everybody has (R., p. 93, ¶9, Ll. 3-4);
3. Heavy work is called exercise and exercise is generally thought to be beneficial (generic observation); and,		3. Dr. Weiss did not see any connection between the Claimant's need for back surgery and his employment (R., p. 94, ¶10, Ll. 1-2);
4. Sedentary workers have high rates of back pain complaint and disability (generic observation) (Ex. 14, Bates No. 014009).		4. Dr. Weiss was troubled that there was no specific event that could be temporally related to the onset of Claimant's back pain (R., p. 94, ¶10, Ll. 3-4);
		5. High impact activities can lead to the progression of underlying arthritis, but do not

actually cause the underlying arthritis (R., p. 94, ¶10, Ll. 4-5);

6-10. Degenerative disc disease may be caused by (6) heredity, (7) age, (8) diet, (9) smoking or (10) obesity (R., p. 94, ¶11, Ll. 13-14);

11. Dr. Weiss render [sic] [rendered] a well-reasoned expert opinion which opined that Claimant's degenerative disc disease and facet arthritis developed over time (R., p. 171, Ll. 9-11);

12. When viewed in context of the entire case, the Commission was persuaded by Dr. Weiss's observations and opinions that Claimant suffered from preexisting degenerative disease and facet joint arthropathy (R., p. 173, Ll. 19-21);

13. According to Dr. Weiss, Claimant's multilevel degenerative disc disease and facet arthritis took place over years and years, and was not something that came on acutely in November of 2007. Dr. Weiss's Depo. pp. 19, 23 (R., p. 174, Ll. 20-22); and,

14. The Commission adopted Dr. Weiss's opinion that Claimant's underlying degenerative joint disease and arthritis were not caused by his work (R., p. 174, Ll. 8-9).

This side-by-side comparison conclusively proves that **none** of Dr. Weiss' 14 the new / different post-hearing opinions relied on by the Commission to deny this claim **were properly disclosed and set forth** in Dr. Weiss' 10.1.08 IME report. The Commission did not have any substantial and competent evidence in the record to support its conclusion that Dr. Weiss' post-

hearing deposition opinions "do not involve new medical causation opinions" and that conclusion should be reversed on appeal.

(6) THE INDUSTRIAL COMMISSION MISAPPLIED THE LAW WHEN IT DENIED THE CLAIMANT'S MOTION TO STRIKE UNDISCLOSED MEDICAL OPINIONS

A. The Claimant's I.R.C.P. 26(b)(4) Motion To Strike

The Defendants argue that medical experts in worker's compensation claims are special experts that are somehow exempt from the pre-hearing expert witness disclosure requirements of I.R.C.P. 26(b)(4) and Dr. Weiss **should not be** ***"precluded from expanding upon, explaining, or otherwise altering the opinions disclosed in exhibits prior to hearing***" when he testified during his 1.27.09 post-hearing deposition (Resp. Br., p. 13, Ll. 12-14) (emphasis supplied).

The Claimant strongly disagrees with the Defendants' argument that Dr. Weiss had the right to ***"expand upon"*** or ***"alter"*** the 1 opinion and 3 generic observations set forth in his 10.1.08 IME report **without first** making proper supplemental pre-hearing disclosures that are required by I.R.C.P. 26(b)(4):

> Idaho Rule of Civil Procedure 26(b)(4) provides that a party can request that the opposing party set forth the identity of the opposing party's expert witnesses **and the substance of the experts' opinions**. **Rule 26(e) imposes a duty on parties to seasonably update interrogatory responses** and provides that the "trial court **may exclude the testimony** of witnesses or the admission of evidence **not disclosed** by a required supplementation of the responses of the party."
>
> This Court has previously held that **a trial court abused its discretion and committed reversible error by allowing expert testimony, which was not properly disclosed** in violation of Rule 26. Radmer v. Ford Motor Co., 120 Idaho 86, 813 P.2d 897 (1991)...
>
> On appeal, the defendant argued that the trial court committed reversible error by allowing Pool to testify regarding his reconstruction theory. In its analysis of the

> issue, this Court quoted the language of I.R.C.P. 26(e)(1), stating that the rule "unambiguously imposes **a continuing duty to supplement responses** to discovery with respect to the substance and subject matter of an expert's testimony **where the initial responses have been rejected, modified, expanded upon, or otherwise altered in some manner**." Id. (citations omitted). This Court then quoted the advisory committee to the federal rules, which in reference F.R.C.P. 26 provides:
>
> In cases of this character a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. **Effective cross-examination** of an expert witness **requires advance preparation** . . . . Similarly, **effective rebuttal requires advance knowledge of the line of testimony** of the other side. If the latter is foreclosed by a rule against discovery, **the narrowing of issues and elimination of surprise** which discovery normally produces are frustrated. Id. (quoting Advisory Committee Notes, rule 26, Fed. Rules Civ.Proc., 28 U.S.C.A.) (alterations in original) *Clark v. Klein*, 137 Idaho 154, 156-158, 45 P.3d 810, 812-814 (2002) (emphasis supplied).

The Defendants' argument that Dr. Weiss had the right to modify, expand upon or otherwise alter the 1 opinion and 3 observations in his 10.1.08 report without first making proper pre-hearing supplemental disclosure as required by I.R.C.P. 26(e) is directly contradicted by this Court's holding in *Clark* and should be rejected. Since *Clark* was decided in 2002, this Court has consistently applied the pre-trial expert witness disclosure requirements of I.R.C.P. 26(b)(4) and I.R.C.P. 26(e) to promote fairness and candor in all kinds of civil proceedings where expert witnesses are involved. *See Schmechel v. Dille*, 148 Idaho 176, 219 P.3d 1192 (2009).

If Dr. Weiss' 14 new / different post-hearing opinions are allowed to remain in the record of this case, the Claimant will be stripped of the following rights:

- The Claimant will be stripped of his right to **effectively prepare for the cross examination** of Dr. Weiss during his 1.27.09 post-hearing deposition;

- The Claimant will be stripped of his right to right to obtain **effective pre-hearing rebuttal opinion** from Dr. Frizzell and Dr. Bates because Dr. Weiss' 14 new post-hearing deposition opinions were **not** properly disclosed prior to the 12.19.08 hearing in Dr. Weiss' 10.1.08 IME report. Dr. Frizzell and Dr. Bates could not rebut new post-hearing opinions which they had not seen. The opinions in Dr. Frizzell's 10.30.08 rebuttal report (Ex.8, p. 008041-008042) and Dr. Bates' 12.4.08 rebuttal report (Ex. 7, p. 007016-007017) were necessarily limited in scope to responding to the information in Dr. Weiss' 10.1.08 IME report.

- The Claimant will be stripped of his right to use pre-hearing interrogatories as a tool of compulsory process to **narrow the factual and legal issues for hearing** and **eliminate the unfair surprise** at hearing which results from a **post-hearing ambush attack** of new / different medical opinions.

The pre-hearing discovery and expert witness disclosure rules of J.R.P. 7(A), J.R.P. 7(C) I.R.C.P. 26(b)(4) and I.R.C.P. 26(e) are **binding on** the Commission. The Industrial Commission denied the Claimant's I.R.C.P. 26(b)(4) and I.R.C.P. 26(e) Motion To Strike **without making any findings of fact or conclusions of law** which would explain why the Commission refused to apply the expert witness pre-hearing disclosure standards of I.R.C.P. 26(b)(4) and I.R.C.P. 26(e) to the facts of this case and exclude all of Dr. Weiss' new / different post-hearing medical opinions (R., pp. 176-177).

This arbitrary ruling without findings constituted an abuse of discretion under the standards of *Sun Valley, supra,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). The Commission's denial of Claimant's Motion To Strike based on I.R.C.P. 26(b)(4) and I.R.C.P. 26(e) should be reversed and all of Dr. Weiss' post-hearing opinions that were not properly disclosed in his 10.1.08 IME report should be excluded from evidence.

B. The Claimant's J.R.P. 10(E)(4) Motion To Strike

The Industrial Commission gave the Defendants an unfair advantage in this case by allowing the Defendants to create, develop and / or manufacture at least 14 new / different medical opinions from Dr. Weiss during his 1.27.09 post-hearing deposition **that were not properly disclosed** by the Defendants prior to the 12.19.08 hearing in Dr. Weiss's 10.1.08 IME report in direct violation of J.R.P. 10(E)(4). The Claimant filed a Motion To Strike all undisclosed post-hearing opinions from Dr. Weiss that did not appear in his 10.1.08 IME report, but the Commission misapplied the post-hearing deposition exclusionary rule of J.R.P. 10(E)(4) and denied the Claimant's Motion To Strike:

> Unless the Commission, for good cause shown, shall otherwise order at or before the hearing, **the [medical opinion] evidence presented by post-hearing deposition shall be [medical opinion] evidence known by or available to the party at the time of the hearing and shall not include [medical opinion] evidence developed, manufactured, or discovered following the hearing**. Experts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing but not on evidence developed following hearing, except on a showing of good cause and order of the Commission. Lay witness rebuttal evidence is only admissible post-hearing in the event new matters have been presented and the Commission so orders. J.R.P. 10(E)(4) (emphasis supplied) [medical opinion supplied].

The exclusionary rule of J.R.P. 10(E)(4) is not ambiguous. The **medical opinion evidence** that is being presented to the Commission by post-hearing deposition **shall be medical opinion evidence** that was **known by or available to** the parties at the time of hearing. If the medical opinion evidence is **created, developed or manufactured** after the hearing, it is not admissible during a post-hearing deposition and **must be excluded** from the evidence pursuant to the exclusionary rule of J.R.P. 10(E)(4).

Since none of the 14 new / different medical opinions that the Commission relied on to deny this claim appeared in Dr. Weiss' 10.1.08 IME report, it is ***axiomatic*** that they were created, developed or manufactured after the 12.19.08 hearing and, therefore, could not have been known by or available to the Claimant at the time of hearing.

The Defendants cite the case of *Lorca-Merono v. Yokes Washington Foods, Inc.*, 137 Idaho 446, 50 P.3d 461 (2002) for the proposition that the Industrial Commission did not misapply J.R.P. 10(E)(4) when it admitted Dr. Weiss' post-hearing opinions into evidence (Resp. Br., p. 14, LL. 2-18). The Defendants' reliance on the holding from *Lorca-Merono* is misplaced:

> The Commission overruled Claimant's objection to Dr. Linder's deposition testimony on the grounds that Claimant had failed to identify any document provided to Dr. Linder after the hearing that was not known at the time of the hearing, that on direct examination Dr. Linder essentially repeated the diagnoses and conclusions contained in his medical reports that had been admitted into evidence at the hearing, and that the majority of his deposition testimony was developed during cross-examination by Claimant's counsel. **On appeal, Claimant has not identified any diagnosis or opinion rendered by Dr. Linder during his deposition testimony that differed from the diagnoses and opinions contained in his earlier reports.** *Lorca-Merono v. Yokes Washington Foods, Inc.*, 137 Idaho 446, 454, 50 P.3d 461, 469 (2002) (emphasis supplied).

The fundamental distinction between the facts of this case and *Lorca-Merono* is that the Claimant in this case has not only **specifically identified** at least 14 new / different medical opinions issued by Dr. Weiss during his 1.27.09 post-hearing deposition **that were new / different from** the 1 opinion and 3 generic observations set forth in Dr. Weiss' 10.1.08 IME report, the Claimant established that the Commission **relied on** each of these 14 new / different post-hearing opinions to deny this claim. Based on the facts in the record in this case, the Industrial Commission clearly misapplied the exclusionary rule of J.R.P. 10(E)(4) and this

Court's holding in *Lorca-Merono* when it denied the Claimant's Motion To Strike. This ruling should be reversed.

J.R.P. 7(A), J.R.P. 7(C), I.R.C.P. 26(b)(4), I.R.C.P. 26(e) and J.R.P. 10(E)(4) are all in ***pari materia*** and should be construed consistently with each other because they all relate to the standards which govern the pre-hearing disclosure and admissibility of expert opinion evidence.

> Statutory interpretation begins with an examination of the literal words of the statute. Grand Canyon Dories v. Tax Comm'n, 124 Idaho 1, 5, 855 P.2d 462, 466 (1993). The language of the statute is to be given its plain, obvious and rational meaning. Id. Where statutes are in pari materia (relating to the same subject matter), they should be construed together to give effect to legislative intent. Dewey v. Merrill, 124 Idaho 201, 204, 858 P.2d 740, 743 (1993). *State, Dep't of Health Welfare ex rel. Lisby v. Lisby,* 126 Idaho 776, 779, 890 P. 2d 727, 730 (1995).

The Commission misapplied these rules when it refused to exclude all post-hearing opinions from Dr. Weiss that the Defendants did not properly disclose prior to hearing and consequently could not have been known by or available to the Claimant at the time of hearing. The Commission's ruling denying Claimant's Motion To Strike should be reversed.

(7) THE INDUSTRIAL COMMISSION MISAPPLIED THE LAW BY UNFAIRLY WEIGHING DR. WEISS' 14 NEW AND / DIFFERENT POST-HEARING OPINIONS AGAINST DR. FRIZZELL'S PROPERLY DISCLOSED PRE-HEARING OPINIONS

The Defendants have oversimplified the issues in this case and would like the Court to believe that this is just a simple case where the Commission properly weighed the opinions of the medical experts and then exercised its discretion to find Dr. Weiss' opinions more persuasive:

> The crux of this case boils down to the Industrial Commission finding the analyses and opinions of Respondents' expert, Dr. Weiss, more persuasive than

> those of Claimant's expert, Dr. Roy Tyler Frizzell (Resp. Br., p. 9, Ll. 24- p. 10, L. 1).
>
> [I]t is the Commission's relative weighing of the opinions of Dr. Weiss and Dr. Frizzell upon which the case turned (Resp. Br., p. 26, Ll. 20-22).

The Claimant realizes that the Commission is free to determine the relative weight to assign to the opinions of the medical experts. *Lorca-Merono, supra*, 137 Idaho 451, 50 P.3d 466 (2002). However, the Commission is **not free** to unfairly perform its weighing analysis like it did in this case. To be fair to both parties, the Commission must only compare the medical opinions from the parties' medical experts which have been **properly disclosed** prior to the hearing and are **known by and available to the parties** at the time of hearing.

The medical opinions that had been properly disclosed and were known by and available to the parties at the time of hearing consisted of the following 4 reports:

1. Dr. Frizzell's 5.5.08 PFC medical report (Ex. 8, pp. 008039-008041);
2. Dr. Weiss' 10.1.08 IME report (Ex. 14, pp. 014005-014009);
3. Dr. Frizzell's 10.30.08. rebuttal of Dr. Weiss' 10.1.08 IME report (Ex. 8, pp. 008041-008042); and,
4. Dr. Bates' 12.4.08 rebuttal of Dr. Weiss' 10.1.08 IME report (Ex. 7, pp. 007016-007017).

If the Commission had properly limited the scope of its medical opinion weighing analysis to those 4 reports, the only legal conclusion supported by the evidence in the record was that the Claimant had met his burden of proving a compensable occupational disease claim and the Defendants had failed to rebut his PFC evidence. Therefore, Claimant was entitled to benefits as a matter of law.

The Defendants criticize the Claimant for not taking Dr. Frizzell's post-hearing deposition (Resp. Br., p. 17, Ll. 7-8). However, the Claimant's decision to forego Dr. Frizzell's

post-hearing deposition must be evaluated in the context of the **extremely limited** medical opinion evidence that the Defendants disclosed prior to hearing in Dr. Weiss' 10.1.08 IME report and was "known by and available to" the Claimant at the time of hearing.

Based on Dr. Weiss' 1 opinion that surgery was appropriate and the 3 generic observations in Dr. Weiss' 10.1.08 IME report, there was absolutely no reason for the Claimant to invest $3,300.00 to pay Dr. Frizzell to testify at a post-hearing deposition (R., p. 155, Ll. 29-36). The Claimant had the right to expect that the Industrial Commission would properly limit the Defendants' medical opinion evidence to the information in Dr. Weiss' 10.1.08 report pursuant to J.R.P. 10(E)(4), I.R.C.P. 26(b)(4) and I.R.C.P. 26(e).

The Industrial Commission misapplied the law when it allowed the Defendants to **bait** the Claimant into hearing based on 1 set of known facts and medical opinions and then **switch** the medical evidence in the case after the 12.19.08 hearing and **ambush** the Claimant with at least 14 new / different medical opinions from Dr. Weiss that were created, developed or manufactured post-hearing. This Court should reverse the Commission's unfair decision to give greater weight to Dr. Weiss' new / different post-hearing opinions which were **not properly disclosed** to Claimant prior to the 12.19.08 hearing.

(8) THE DEFENDANTS ADMIT THAT DR. WEISS WAS NOT COMPETENT TO RENDER A CAUSATION OPINION BECAUSE HE KNEW NOTHING ABOUT THE HAZARDS OF THE CLAIMANT'S SAWYER / ASSEMBLER JOB BUT THEN CLAIM THAT A LACK OF FOUNDATION IS IRRELEVANT

Dr. Weiss admitted under oath that he was not competent to render a medical causation opinion in this case because he did **not** review the Claimant's written job description before

conducting his 10.1.08 IME examination (Dep., p. 34, Ll. 15-22), he did **not** ask the Claimant a single question about his work activities during the 10.1.08 IME examination (Dep., p. 46, L. 25 – p. 47, L. 3) (Tr., p. 51, Ll. 10-12), and he did **not** review the Claimant's hearing testimony describing his work activities before he gave his post-hearing medical opinions (Dep., p. 34, Ll. 6-14).

The Defendants have **admitted** that Dr. Weiss knew absolutely nothing about the specific hazards of the Claimant's Sawyer / Assembler job duties **prior to** issuing his 10.1.08 IME report and his new / different 1.27.09 post-hearing deposition opinions, but have taken the incredible position that Dr. Weiss' lack of a proper factual foundation for his medical opinions on the most fundamental issue in this case (causation) is **completely irrelevant**.

> First, he argues the Commission, and now this Court, should discount or entirely ignore Dr. Weiss' opinions because he did not review Claimant's job description or hearing testimony, or ask Claimant about his job, before issuing his IME report or giving his deposition. *See, e.g., Cl. Brief p.* 13, 25. **While true, this is completely irrelevant.** (Resp. Br., p. 12, Ll. 2-6) (emphasis supplied).

The Claimant is bewildered by the Defendants' position. This Court did not find it completely irrelevant in *Page II* when a medical expert did not have a proper factual foundation to issue a medical stability opinion because he did not first examine the patient before issuing his opinion:

> Dr. Petersen was the only person to testify Page achieved clinical stability on that date, and the Commission noted it placed great weight on his testimony. It is **unrebutted** that Dr. Petersen's statement was **not based upon** an examination of Page or other medical follow-up. Therefore, contrary to the Commission's conclusion, a subsequent letter from Dr. Petersen stating that Page had not actually achieved medical stability on November 26, 2001, combined with the absence of any other evidence in the record to support the Commission's finding

> of medical stability constitute a sufficient factual basis to warrant review of the case **to correct a manifest injustice**. This is not to say that every medical provider who changes their mind provides grounds for an argument of "manifest injustice." Here, **there was no evidence to support Dr. Petersen's original opinion of clinical stability** and then when the relevant facts were brought to his attention he reviewed his record and appropriately revised his opinion. Thus, the Commission's denial of Page's motion for review to correct a manifest injustice is reversed and the case is remanded. *Page v. McCain Foods, Inc. (Page II),* 145 Idaho 302, 306, 179 P.3d 265, 269 (2008) (emphasis supplied).
>
> I.R.E. 703 describes the **factual foundation** that must support an expert's opinion:
>
> **The facts** or data in the particular case **upon which an expert bases an opinion** or inference may be **those perceived by or made known to the expert at or before the hearing**. (emphasis supplied).

Since it is **unrebutted** that Dr. Weiss did not perceive or know any facts about the hazards of the Claimant's Sawyer / Assembler job at or before the time he issued his medical opinions, none of Dr. Weiss' 14 new / different medical opinions relied on by the Commission to deny this claim were supported by a proper factual foundation and all of them should be excluded:

> The admission of expert testimony is within the sound discretion of the trial court. Burgess v. Salmon River Canal Co., Ltd., 127 Idaho 565, 903 P.2d 730 (1995). **Expert opinion must be based upon a proper factual foundation**. *Bromley v. Garey,* 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999).
>
> ***
>
> We have held that it is **incumbent upon an expert to set forth specific facts upon which an opinion is based**. *J-U-B Engineers v. Security Ins.*, 146 Idaho 311, 316, 193 P.3d 858, 863 (2008).
>
> ***
>
> [T]he Commission concluded that the letter did not contain substantial evidence that was contrary to the presumption that the injury arose out of the employee's employment. In doing so, the Commission stated, among other things, that **the "uncertain foundation" for the opinion** contained in the letter caused the Commission to conclude that the surgeon's "opinion is **not evidence which a**

reasonable mind would accept to support a Conclusion. *Politte v. Idaho Department of Transportation and State Insurance Fund*, 126 Idaho 270, 272, 882 P.2d 437, 440 (1994)).

When a medical expert testifies that exposure to hazard "A" did not cause occupational disease "B", but then admits that he did not know anything about hazard "A", by definition, that medical expert's causation opinion lacks a proper factual foundation (i.e., is based on pure speculation) and does **not** constitute substantial and competent evidence that a reasonable mind would accept to support a conclusion. The Commission erred when it gave greater weight to the opinions of Dr. Weiss in this case.

(9) THE FACTS AND MEDICAL OPINIONS OF THIS CASE ARE CLOSELY ANALOGOUS TO *FLORES*

The important parallels between the facts and medical opinion evidence in this case and *Flores v. Boise Cascade*, II 0420 (2008) have been argued extensively by the Claimant before the Commission and on appeal (*See* Arguments 7 and 8 in Appellant's Brief at pp. 38-35). The Claimant will not repeat those arguments here. The Defendants argue that "the Commission found facts differently than in *Flores* and thus reached a different conclusion. That conclusion should not be disturbed on appeal." (Resp. Br., p. 22, LL. 17-19). However, it is important to note that **the only 2 distinctions** the Commission relied on in its decision when it attempted to distinguish this case from *Flores* were that: (1) the Claimant in this case did not work with a particular machine; and (2) the Claimant in this case did not engage in constant or repetitive activity. The Claimant has already established that both of the Commission's purported factual distinctions were erroneous because they were directly contradicted by the evidence in the record

(*See* pp. 32-35 of Appellant's 3.9.10 Brief). The other alleged distinctions argued by the Defendants were not relied on by the Commission in this case do not merit discussion.

What is important to remember from *Flores* is that **the Industrial Commission adopted the consensus of medical opinion** from both the Claimant's attending physician and the Defendants' IME experts and found that a ***causal relationship*** existed between the Claimant's ***exposure*** to the hazards of repetitive lifting, twisting and bending and the Claimant's ***degenerative disc disease and disc herniation***:

> The consensus of medical opinion is that the bending, lifting, and twisting activities of Claimant's work were implicated in causing his degenerative disc disease and disc herniation. Defendants do not dispute that Claimant's job required frequent bending, lifting and twisting ... *Flores, supra*, at ¶47 on p. 19.
>
> I think on a more probable than not basis his current symptoms and his disc herniation at L4-5 on the left are related to his work in that he has to do repetitive bending, lifting and twisting primarily on the left. Although this gentleman does not have a specific traumatic episode, trip and fall, or a classic identifying injury I think this represents a repetitive injury to his low back. *Id.* at ¶20 on p. 9.
>
> Claimant's work as the slitter operator probably contributed the most to Claimant's second lumbar herniation, and the continuous lifting and twisting that this job required was not comparable to manual labor work in general. *Id.* at ¶32 on p. 13.

Dr. Weiss did not even take the time to review the Claimant's written job description (Ex. 3) or ask the Claimant a single question about the hazards of his job duties, and yet the Commission gave his medical causation opinions greater weight than the opinions of Dr. Frizzell and Dr. Bates (who both read and considered the hazards in the Claimant's written job description) and the consensus of medical opinion in *Flores*. The facts and medical opinion evidence in *Flores* are closely analogous to this case and support award of benefits to the

Claimant.

(10) *NELSON* IS AN AFFIRMATIVE DEFENSE THAT MUST BE RAISED AND PROVED BY THE DEFENDANTS

This Court's holding in *Nelson v. Ponsness Warren Idgas Enterprises*, 126 Idaho 192, 879 P.2d 492 (1994) only applies in those cases where the Claimant is seeking compensation for the aggravation of a preexisting condition. This is not a *Nelson* type case. The Claimant in this case did not have a preexisting condition in his low back when he filed his non-acute lumbar spine occupational disease claim [4].

If the Claimant did suffer from a preexisting condition in his low back when he filed this occupational disease claim, it would have been the Defendants' duty to investigate the claim, determine whether there were any facts to support the finding of a preexisting condition and then raise the *Nelson* defense. Affirmative defenses must be raised and proved by the Defendants - not disproved by the Claimant as part of his case-in-chief. *Seamans v. Maaco Auto Painting & Body Works*, 128 Idaho 747, 752, 918 P.2d 1192, 1197 (1996).

The Industrial Commission properly characterized the *Nelson* doctrine as an affirmative defense and asked the Defendants if they intended to raise that affirmative defense at the 12.19.08 hearing:

> REFEREE POWERS: And I'm also under the understanding that this is being brought forward as an occupational disease claim versus an accident or are you going to argue both?
> MR. KALLAS: No, Your Honor. We are limited to an occupational disease in this case. There never was an accident.
> REFEREE POWERS: Okay. And is this involving a ***Nelson type defense*** or --

---

[4] See Arguments 10(A) – 10(F) at pp. 37-47 of Appellant's 3.9.10 Brief.

MR. HARMON: ***No, Your Honor.***
REFEREE POWERS: Okay. All right. And have I stated the issue correctly?
MR. KALLAS: Yes, Your Honor. But implicit within that issue I assume the claimant has to meet its [sic] [his] burden of proving a compensable occupational disease first.
REFEREE POWERS: Yes. (Tr., p. 4, L. 17 – p. 5, L. 7) (emphasis supplied).

In its Order on Reconsideration, the Commission again referred to this Court's holding in ***Nelson*** as being a "defense" :

> The ***Nelson defense*** was not a noticed issue but whether Claimant incurred an occupational disease was a noticed issue. The Supreme Court's ruling in *Nelson* is not an optional law that the Commission can ignore if the parties so request. *Nelson* deals with the threshold compensability of an occupational disease (R., p. 175, Ll. 2-5) (emphasis supplied).

The Commission made it clear that it was the Defendants' burden of raising and proving the *Nelson* defense. The Workers' Compensation Act does not contain any provision that requires the Claimant to disprove the *Nelson* defense as part of his case-in-chief. The burden of raising and proving the *Nelson* defense has always rested with the Defendants and that is where it should remain.

If the Commission takes it upon itself to ***sua sponte*** raise affirmative defenses that have already been waived by the Defendants and then applies those affirmative defenses to deny claims, the Commission starts to look more like an advocate and less like a fair and impartial tribunal. Following this logic to the extreme, the Commission would have a duty to raise every conceivable affirmative defense that finds support in existing law in every single case regardless of whether that defense was raised by the Defendants in their pleadings or waived on the record. This is not the proper role of a fair and impartial tribunal. The *Nelson* defense was not properly raised and proved by the Defendants and never should have been relied on by the Commission to

deny this claim.

(11) THERE IS NO SUBSTANTIAL AND COMPETENT EVIDENCE IN THE RECORD TO PROVE A PREEXISTING LOW BACK CONDITION THAT COULD SERVE AS THE FOUNDATION FOR APPLICATION OF THE *NELSON* DEFENSE

The Defendants disregard the overwhelming weight of evidence in the record and continue to argue that the Claimant suffered from a preexisting condition in his low back. The evidence in the record does **not** support the finding of a preexisting condition. Each of the Defendants' preexisting condition arguments will be refuted below with the evidence in the record.

(a) Prior to Working For Joslin The Claimant Did Not Complain to Another Employer That He Wanted to Get Out of the Drywall Business Due to Back Pain

(*See* Resp. Br., p. 2, Ll. 6-8; p.25, Ll. 7-9)

The Defendants misstate the record when they represent the following statement as a fact from Ex. 2 instead of the Industrial Commission's misquote of a hearsay statement which is what it actually is:

> "Prior to his employment with Joslin, Claimant had complained to his supervisor that he wanted to get out of the drywall business because it was causing him back pain. (Resp. Br., p. 2, Ll. 6-8).

Exhibit 2 consists of 2 hearsay statements from the Claimant's former supervisor at Joslin, Brian Leisten. Mr. Leisten alleged in his hearsay statements that the Claimant told him during his initial job interview with Joslin that he had experienced soreness in his "elbow, shoulder and back" while working as a sheet rocker and was looking to get into a different line of work (Ex. 2, p. 002001). The Commission misquoted this hearsay statement and read it to say

that "prior to the commencement of his employment by Joslin, Claimant **had complained to another employer** that he hoped to get out of the drywall business because it was causing him **low back pain**":

> Also, prior to the commencement of his employment by Joslin, Claimant had complained to another employer that he hoped to get out of the drywall business because it was causing him low back pain. Claimant's underlying degenerative joint disease and arthritis was certainly present in November 2007 and was not caused by his work. (R, p. 94, ¶11, Ll. 9-11).

This erroneous finding was important to the outcome of this case because the Industrial Commission based its key *Nelson* finding that the Claimant suffered from a preexisting condition in his low back on the Commission's misquote of a hearsay statement. The Claimant asked the Commission to correct his erroneous finding on reconsideration (R., p. 111, ¶11), but the Commission refused:

> Claimant was questioned about this statement and his testimony was that prior work caused pain in his elbow but not his back. Hearing Transcript, p. 17 . Yet, the sentence quoted above is supported in the record by the statement of Claimant's production supervisor. Claimant's Exhibit 2. (R., p. 172, ¶3, Ll. 4-7).

The Claimant gave **uncontroverted testimony** at the 12.19.08 hearing and denied telling Mr. Leisten that he got out of the sheet rocking business due to back pain:

> Q Okay. Well, during this leisurely conversation that you had with Mr. Listen [sic] [Leisten] in the truck on your first day of employment, did Mr. Listen ask you why you wanted to get out of the drywall business
> A Yes, sir.
> Q And what did you tell him in response to that question?
> A I had been swinging an axe for, you know -- a hammer. I'm sorry. For nine years and my elbow just couldn't take the pressure anymore.
> Q During that conversation **did you tell Mr. Listen** that you also experienced soreness in your shoulder **and back** due to the physical demands of your job as a drywaller?
> A **No, sir**. (Tr., p. 17, Ll. 8-22) (emphasis supplied).

The Claimant's denial was uncontroverted. The Defendants did **not** call a single witness at hearing. Because the Commission's misquote of Mr. Leisten's hearsay statement is directly contradicted by his actual statements in Ex. 2, the Commission's erroneous finding must be must be reversed.

> In our view, this finding directly conflicts with the evidence that was before the Commission, and is not justified by our prior case law. This Court will overturn the Commission's findings of fact when such findings are unsupported by substantial competent evidence. *Nelson v. Ponsness-Warren Idgas Enter.*,126 Idaho 129, 131, 879 P.2d 592, 594 (1994).

(b) The Claimant's 2 Prior Auto Accidents Did Not Injure His Low Back

(Resp. Br., p. 25, Ll. 9-13)

The Defendants misstate the evidence in the record. The Claimant never suffered any injury to his low back in either of these 2 prior MVA accidents. The Claimant only complained of neck and **upper back pain** in his 5.16.06 motor vehicle accident (*See* Ex. A, pp. 1-2, Ex. 8, p. 008041). There are no medical records in the record to support the Defendants' speculative argument that the Claimant might have suffered injury to his low back when he was in a motor vehicle accident with his grandfather at the age of 14. The Claimant' testimony at the 12.19.08 hearing that he did not suffer any injury to his low back is **uncontroverted**:

> Q Did you require any **medical treatment** in connection with that single vehicle roll-over accident?
> A No, sir.
> Q Did you **suffer any injuries to your low back** in that roll-over accident?
> A **No, sir.** (Tr., p. 14, Ll. 7-12) (emphasis supplied).

(c) 2 Visits To Dr. Meissner in December of 2005 Do Not Support The Commission's Preexisting Condition Findings

(Resp. Br., p. 2, Ll. 1-5; p. 25, Ll. 4-6).

The Commission erroneously found that the Claimant suffered from the preexisting conditions of underlying arthritis (R., p. 94, ¶10, L. 5), degenerative disc disease and facet arthritis (R., p. 94, ¶11, L. 6), and underlying degenerative joint disease and arthritis (R., p. 94, ¶11, L. 12). The Claimant explained why 2 trips to a chiropractor in December of 2005 with a transitory complaint of low back pain (no left leg radiculopathy) did not constitute a substantial and competent basis to support the Commission's findings (*See* Claimant's rebuttal Arguments 10(C) - 10(E) at pp. 40-44 of Appellant's 3.9.10 Brief).

The record in this case does not contain any substantial and competent evidence to support the Commission's finding of the severe preexisting conditions that it found. The Defendants appear to concede that the *Nelson* defense should never have been a part of this case when they ask the Court to affirm the Commission's denial based on the "relative weighing of the opinions of Dr. Weiss and Dr. Frizzell upon which the case turned." (Resp. Br., p. 26, Ll. 21-22).

(12) THE DEFENDANTS EFFECTIVELY CONCEDE THAT THE INDUSTRIAL COMMISSION MISAPPLIED THE LAW OF *NELSON* AND ITS PROGENY

The Claimant explained in his 3.9.10 Appellant's Brief how the Industrial Commission misapplied the law of *Nelson* and its progeny and made erroneous findings of fact to support its conclusion that the Claimant suffered from a preexisting condition in his low back that could trigger the *Nelson* defense (See Arguments 10(A) – 10(F) at pp. 37-47 of Appellant's 3.9.10 Brief).

The Defendants **did not dispute** the Claimant's argument that this Court's holding in *Sundquist, supra,* 141 Idaho 450, 455, 111 P.2d 135, 140 (2000) precluded the Commission from finding a preexisting condition based on the facts in this case because *Sundquist* requires the preexisting condition to be a " pre-existing injury caused by an accident":

> Unlike in DeMain, here the record contains no suggestion Sundquist's pain resulted from having aggravated a **pre-existing injury caused by an accident**. Consequently, the holding in DeMain does not apply to the present facts. *Id.* 141 Idaho 450, 455, 111 P.3d 135, 140 (2000) (emphasis supplied).

The Commission did not find that the Claimant suffered from a "pre-existing injury caused by an accident" as required by *Sundquist*. The Commission specifically found that the Claimant's low back pain in December of 2005 came on **without an accident**:

> Dr. Meissner's records from December 2005 reflect that Claimant's low ***back pain arose without accident*** and was first noted on a Sunday, while at home (R., p. 94, ¶11, Ll. 8-9) (emphasis supplied).

Since the Defendants did not dispute that the Commission misapplied the *Sundquist* definition of what constitutes a "pre-existing condition" under *Nelson*, the Court should treat the Defendants' failure to rebut this argument as a concession by the Defendants that the Commission misapplied the law.

The Defendants also **failed to dispute** the Claimant's argument that the Commission misapplied the law when it gave retroactive application to the results of the Claimant's 1.23.08 MRI scan in order to support its speculative finding that the Claimant suffered from a preexisting condition in his low back which did not exist. The Defendants **did not dispute** that *Nelson* and its progeny all require that the pre-existing condition be diagnosed and / or verified with

contemporaneous medical testing **prior to** the date when the Claimant goes to work for Defendant Employer and / or **prior to** the date when his current occupational disease becomes manifest (*See* discussion of need for contemporaneous medical evidence to prove a pre-existing condition discussed at pp. 46-47 of Claimant's 3.9.10 Appellant's Brief).

Since the Defendants **did not dispute** that the Commission misapplied the law of *Nelson* and its progeny by giving retroactive application to the results of the Claimant's 1.23.08 MRI in order to support its speculative finding that the Claimant suffered from a "pre-existing condition" in his low back, the Defendants have conceded this misapplication of the law.

(13) THE INDUSTRIAL COMMISSION COMPLETELY OVERLOOKED SUBSTANTIAL AND COMPETENT EVIDENCE IN THE RECORD ON THE CAUSATION ISSUE

The Commission's decision does not contain any reviewable findings of fact or conclusions of law which confirm that the Commission ever read or considered the medical opinions set forth in Dr. Frizzell's 10.30.08 rebuttal report and Dr. Bates' 12.4.08 rebuttal report (R., p. 88-99) (R., pp. 170-178) (Ex. 8, p. 008041-008042) (Ex. 7, p. 007016-007017). The Claimant filed a Motion For Reconsideration and asked the Commission to amend paragraph 7 of its 6.8.09 decision to accurately reflect all of the evidence that the Claimant presented on the causation question, including Dr. Frizzell's 10.30.08 rebuttal report and Dr. Bates' 12.4.08 rebuttal report (R., p. 103, ¶7(a)(4) – (5)). The Commission did not explain in its 10.14.09 Order on Reconsideration why it completely **overlooked and / or ignored 67%** of the Claimant's prima facie case medical evidence (i.e., the medical opinions in Dr. Frizzell's 10.30.08 rebuttal report and Dr. Bates' 12.4.08 rebuttal report).

When both the Claimant and the Defendants agree that causation is the decisive issue in the case and the Commission fails to make meaningful findings of fact on 67% of the medical evidence presented by Claimant to meet his burden of proving the causation issue, the Commission's ultimate decision on the causation issue would appear to be arbitrary because it is not based on a well reasoned analysis of all of the medical evidence in the record:

> To properly review an order of the Commission under the appropriate standard of review, it is essential that the order of the Commission be based upon reviewable findings of fact and conclusions of law. *Iverson v. Farming,* 103 Idaho 527, 530, 650 P.2d 669, 672 (1982). *Curr v. Curr*, 124 Idaho 686, 690, 864 P.2d 132, 137 (1993).

The Commission also overlooked and failed to make findings on all of the post-hearing medical opinions from Dr. Weiss which supported a causal relationship between exposure to the hazards of repetitive heavy lifting, twisting and bending and the Claimant's lumbar spine occupational disease:

(a) Dr. Weiss' admitted under oath that the Defendants did not provide him with any evidence to refute the Claimant's testimony that his job required him to engage in certain body postures and activities which are known to cause high impact to the back and significantly increase intradiscal pressure; i.e., repetitively lift, twist and bend at the waist (Dep., p. 50, L. 10 - p. 52, L. 19).

(b) Dr. Weiss admitted under oath that combined bending, twisting and lifting activities at any level do not just aggravate back pain, but can actually cause impact activity to the back (Dep., p. 64, Ll. 19-21).

(c) Dr. Weiss admitted under oath that "if you bend, twist, and lift, what you're doing is you're putting increased pressure on one of the disks as opposed to using both of them, so that's going to increase it right there. And you're also increasing pressure on just part of the disk, instead of using the whole disk" (Dep., p. 66, Ll. 16-21).

(d) Dr. Weiss admitted under oath that the combined movement of lifting while bending forward at the waist would increase the load or pressure on the person's intervertebral

disks (Dep., p. 67, Ll. 13-17).

(e) Dr. Weiss admitted under oath that there is a relationship between certain body postures and activities and intradiscal pressure (Dep., p. 62, Ll. 15-17).

(f) Dr. Weiss admitted under oath that L5-S1 disc herniations (like the one suffered by Claimant in November of 2007) were the most common type of disc herniations (Dep., p. 59, Ll. 9-14), and,

(g) Dr. Weiss admitted that in cases where a disc herniation is present, the person's doctor would limit the person from things that cause impact activity to the back, which are combined bending, twisting and lifting activity at any level (Dep., p. 64, Ll. 19-21).

The Claimant and this Court have no way of knowing from the record why the Commission chose to overlook 2/3 of the Claimant's medical evidence and all of Dr. Weiss' opinions which tended to establish a causal relationship between the Claimant's job duties and his lumbar spine disease on a more likely than not basis. By failing to make meaningful findings of fact on the critical causation issue, the Commission did not create a record that allows for meaningful appellate review.

(14) CORRECTIONS OF THE DEFENDANTS' MISSTATEMENTS OF THE RECORD

(A) The Defendants' Claim That Dr. Weiss Issued A Causation Opinion in His 10.1.08 IME Report

The Defendants have misstated the evidence in the record when they represent that Dr. Weiss issued a causation opinion in his 10.1.08 IME report:

> Dr. Weiss stated in his IME report that Claimant's degenerative disc disease was not causally related to his job. *Weiss tr.* 43:17-45:11. (Resp. Br., p. 16, Ll. 13-15).

The Defendants did not cite to the actual page of Dr. Weiss' 10.1.08 IME report where this alleged causation opinion can be found **because the alleged opinion does not exist.** A

careful reading of his 10.1.08 IME report confirms that Dr. Weiss never issued a causation opinion (Ex. 14, pp. 014005-014009).

In support of their contention that Dr. Weiss' 10.1.08 IME report contained a causation opinion, the Defendants quote the misstatements that were made by Dr. Weiss during his 1.27.09 post-hearing deposition. However, just because Dr. Weiss testified incorrectly that he had issued a causation opinion in his 10.1.08 IME report, that does not mean that the causation opinion actually appears in his report.

The only way to determine if Dr. Weiss actually issued a causation opinion in his 10.1.08 IME report is to carefully examine the information in the "DISCUSSION" section on page 014009 in the context of the 1 simple question that the Defendants asked Dr. Weiss to answer in their 10.1.08 IME engagement letter:

> In your opinion, **is Mr. Watson's back condition** and the recommended **surgery** at L5-S1 **a result of an occupational disease causally related to his employment and occupation** at Joslin Millwork? Please explain. (Ex. 14, p. 014003) (emphasis supplied).

Dr. Weiss never answered this 1 simple causation question anywhere in his 10.1.08 IME report. When asked during his deposition to show the Claimant exactly where he answered the causation question in his 10.1.08 IME report, Dr. Weiss vacillated from page 43 to page 45 of his deposition and then testified:

> ... that paragraph ["DISCUSSION] says that in my opinion it's not causal on a more likely than not basis (Dep., p. 45, Ll. 3-5).

The causation opinion that Dr. Weiss alleges he made in his IME report simply does not exist. The Defendants and Dr. Weiss have both misrepresented the information in Dr. Weiss' report.

(B) The Defendants' Claim That They Disclosed All Medical Expert Opinion Evidence They Would Rely on At Hearing and During Dr. Weiss' Post-Hearing Deposition Prior to Hearing

The Defendants make the incredible claim that they made proper disclosure of "all expert evidence" that they would rely on at hearing and in Dr. Weiss' post-hearing deposition prior to the 12.19.08 hearing:

> Defendants **presented Claimant** - prior to hearing - **with all expert evidence** on which they would rely at hearing and in the post-hearing deposition and briefs (Resp. Br., p. 4, Ll. 12-14) (emphasis supplied).

The Defendants misrepresent the record because the alleged pre-hearing disclosures do **not** appear anywhere in Dr. Weiss' 10.1.08 IME report and that report contained the only medical opinion evidence disclosed by the Defendants prior to the hearing.

(C) The Defendants' Claim that Dr. Frizzell and Dr. Bates Had The Opportunity to Issue Rebuttal Opinion

The Defendants state that both Dr. Frizzell and Dr. Bates had the opportunity to issue rebuttal opinion.

> Second, Claimant himself admits he provided Dr. Weiss' IME to his experts, Drs. Frizzell and Bates, prior to hearing.15 *Cl. Brief p.* 13-14. Those doctors thus had the opportunity to respond and provide a "rebuttal opinion." (Resp. Br., p. 16, Ll. 16-19).

The Defendants' argument is misleading. Dr. Frizzell and Dr. Bates never had the opportunity to rebut Dr. Weiss' 14 new / different post-hearing deposition opinions because the Defendants did not make proper disclosure of those opinions before the hearing in Dr. Weis' 10.1.08 IME report. Although the Claimant forwarded Dr. Weiss' 10.1.08 IME report to both Dr. Frizzell and Dr. Bates and requested their rebuttal reports, their rebuttal opinions were, of necessity, limited to the 1 opinion and 3 generic observations stated in Dr. Weiss' report (*See* Ex. 7, pp. 007016-007017 and Ex. 8, pp. 008041-008042).

(15) THE CLAIMANT'S ENTITLEMENT TO ATTORNEY'S FEES PURSUANT TO IDAHO CODE §72-804

The Defendants represent to this Court that the "paramount" reasonable ground they relied on to deny this claim was Dr. Weiss' 10.1.08 IME report:

> To begin, the **paramount "reasonable ground"** on which Respondents denied benefits was the opinions of Dr. Weiss (Resp. Br., p. 27, Ll. 18-19) (emphasis supplied).

The Defendants misrepresent the record because they admitted in their answer to interrogatory 18 that they made the decision to deny this claim on 6.17.08 – almost 4 months before Dr. Weiss conducted his 10.1.08 IME examination of the Claimant (Ex. 12, p. 012013).

Even after receipt of Dr. Weiss' 10.1.08 IME report, the Defendants still did **not** have any "reasonable ground" to deny this claim because Dr. Weiss did **not** address any element in the prima facie case for an occupational disease claim, Dr. Weiss did **not** answer the 1 causation question that the Defendants asked him to answer and Dr. Weiss' opinions were **not supported** by proper factual foundation and therefore were totally unreliable (Ex. 14, pp. 014005-014009).

At the time of the 12.19.08 hearing, the Defendants had not disclosed 1 adverse fact (Ex. 12) or 1 adverse medical opinion (Ex. 12 and Ex. 14) to support their denial of this claim. The Defendants denied this claim from their initial receipt of Dr. Frizzell's 5.5.08 PFC letter to the 12.19.08 hearing without any factual, medical or legal defense whatsoever. The Claimant should receive an award of attorney's fees and costs pursuant to under Idaho Code §72-804.

Conclusion

The uncontroverted factual evidence and medical opinion evidence in the record at the time of the 12.19.08 hearing proves that the Claimant met his burden of proving a prima facie case for an occupational disease claim and was entitled to receive worker's compensation benefits as a matter of law because the Defendants admitted he met his burden of proof and failed to come forward with substantial evidence to contradict the Claimant's properly disclosed evidence. This Court should reverse the Commission's misapplications of the law and erroneous findings of fact and award the Claimant the following sure and certain relief promised to him by Idaho Code §72-201:

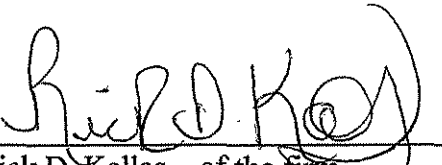
1. All reasonable medical benefits required by the Claimant's attending physicians to treat his non-acute occupational disease and / or needed for a reasonable time after the manifestation of his disease pursuant to Idaho Code §72-432(1);

2. All temporary disability / income benefits that the Claimant is entitled to receive during his period of recovery pursuant to Idaho Code §72-408, §72-409 and §72-419; and,

3. All attorney's fees and costs incurred at every stage of this case pursuant to Idaho Code §72-804 and I.A.R. 41.

Respectfully submitted this 26th day of April, 2010.

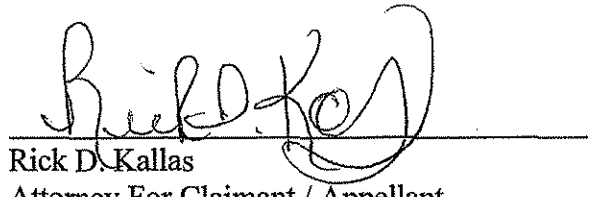
Ellsworth, Kallas, Talboy & DeFranco, PLLC



Rick D. Kallas – of the firm
Attorney For Claimant / Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of April, 2010, I mailed 2 copies of the foregoing Appellant's Brief, postage prepaid, to the following: E. Scott Harmon and / or Kim Doyle, Law Offices of Harmon, Whittier & Day, 6213 N. Cloverdale Rd., Ste. 150, P.O. Box 6358, Boise, ID 83707-6358.



Rick D. Kallas
Attorney For Claimant / Appellant